Business rescue, section 133 and employment litigation

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Without Prejudice

When a company is placed in business rescue, employee claims continue to arise in places like the Commission for Conciliation, Mediation and Arbitration (the CCMA) and the Labour Court. And, there are cases where employees who have not received payment from their employer approach the Labour Court. The question that arises is how these claims are to be addressed.

Section 133 of the Companies Act (71 of 2008) places a general moratorium on all legal proceedings against a company in business rescue. Chapter 6 of the Act locates the innovation of business rescue since 2011. This includes any enforcement action in relation to property belonging to the company. Many companies in rescue face adverse claims from creditors (which includes employees) and are subsequently able to benefit from this moratorium or hold on all legal action or claims of third parties.

The concept "legal proceedings" is not defined in the Act. This has created uncertainty whether "legal proceedings" extends to labour litigation in which the company may become involved while in business rescue. This has resulted in a number of decisions by the courts. The purpose of this article is to analyse whether section 133 of the Act extends to labour disputes as well.

Firstly, in the case of *Fabrizio Burda v Integcomm (Pty) Ltd* the Labour Court in 2013 held that the moratorium is applicable to employment related disputes that are referred to the CCMA and the Labour Court, and that all "legal proceedings" must be held in abeyance in accordance with the moratorium. The court was very clear on its interpretation of the meaning of "legal proceedings".

However in 2014, in the subsequent matter of *NUMSA v Motheo Steel Engineering*, the Labour Court relied on section 210 of the Labour Relations Act (the LRA) to confirm that the right to refer disputes to the CCMA and the Labour Court found in the LRA prevails over the moratorium in the Companies Act.

Although it is quite possible to apply some reasoning to this kind of balancing act employed by the court, it must also be borne in mind that the whole purpose of business rescue is to allow a distressed company some breathing space for its financial and other affairs to be restructured to enable it to trade once again as a successful concern. In 2016 this is what the Labour Court was

alive to in the case of *Sondamase and another v Ellerine Holdings Limited* (in business rescue) and others. It held that the moratorium is designed to provide the business rescue practitioner with time to attempt to rescue the company by implementing a rescue plan.

Although the LRA is very clear on the "prevailing strength" it carries when interpreting it against other pieces of legislation, one must also consider the manner in which, in 2015, the Supreme Court of Appeal interpreted section 133 in *Chetty t/a Nationwide Electrical v Hart and another NNO* in that the relevant section places a moratorium, not only on legal proceedings in court but also on arbitration proceedings.

Over and above what the LRA may say in these circumstances, it must be noted that section 133 in no way extinguishes the rights that employees or their trade union may have to institute claims against the company. It merely suspends any claims pending the rescue process of the company. It must furthermore also be considered in the best interests of the employees to allow the company to see through the rescue process, so that they may still remain economically active in society by retaining their jobs and not having the company immediately liquidated.

In 2013 the *Labour Court in Burda v Integcomm (Pty) Ltd* held that unfair-dismissal proceedings may not be commenced or proceeded with, without the written consent of the business rescue practitioner or leave of the high court that has jurisdiction. What is important to consider here again is not that the court outright denied the employee his right in commencing proceedings in the Labour Court against a company (in business rescue), but rather encouraged the employee to first pursue certain channels as provided by the Act before proceeding with its claim.

A separate question arising out of the workplace concerns which court is to be approached to see the upliftment of the section 133 moratorium. The reference to "court" in Chapter 6 must be interpreted as conferring exclusive jurisdiction on the high court in business rescue related matters and on matters relating to the upliftment of the moratorium. In our view the conclusion was correctly reached by the Labour Court in the recent decision of *Izak Bosman Marais and 56 Others v Shiva Uranium (Pty) Ltd (in business rescue) and Others* where the Labour Court in September 2018 reasoned that the legislature was clear in making provision for a forum (being the high court) to deal with litigation emanating from business rescue proceedings (that is definition of "court" in section 128(1)(e) of the Act) to mean the high court and not a court like the Labour Court.

In conclusion, an assessment of the above shows that one cannot place a standard in law which results in all employees being barred from bringing claims for relief in terms labour issues against a company in rescue. Employees are still afforded this right. Although the moratorium still applies, it is not an absolute bar (as confirmed in the matter of *Kythera Court c Le Rendez-Vous Café' CC t/a News Café Bedfordview and another in 2016*) and employees can

still approach the courts for the relevant relief depending on the facts of the matter. However, the business rescue practitioner in his mandate to rescue the company should surely be advanced his discretion in allowing such claims to proceeded and if the employee still feels affected by his decision, he may always approach the high court for the upliftment of the moratorium.

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